

Chapter 3 - Improper Business Practices and Personal Conflicts of Interest

Section 3.1 Contracting Officer Site Visits for On-Site Contractors

3.1.1 PURPOSE

This policy is intended to notify employees involved in contract management about the potential vulnerabilities in personal services.

3.1.2 BACKGROUND

In 1998, the Office of the Inspector General (OIG) performed an audit of personal services. During this audit, the OIG found continued indications of potential vulnerabilities in personal services. The OIG's key findings included:

- EPA employees exercised excessive supervision over contractor and subcontractor staff;
- Close working relationships existed which led to personal services; and
- Contract language and oversight needed improvement.

This section was originally issued as a Acquisition Policy Memorandum (APM) from Betty L. Bailey, Director of the Office of Acquisition Management to OAM Division Directors, Regional Contracting Officer Supervisors, and Senior Resource Officials on September 9, 1998.

3.1.3 AUTHORITY/APPLICABILITY *(RESERVED)*

3.1.4 DEFINITIONS *(RESERVED)* 3.1.5 POLICY

Contracting Officers (COs) should perform on-site visits periodically on all on-site contracts, and if weaknesses are identified, the COs will perform annual visits. In addition, COs will discuss personal services issues with POs for individual on-site contracts on an annual basis.

This policy should be distributed to all employees involved in contract management (e.g., Contracting Officers (COs), Project Officers (POs), work assignment managers (WAMs), Delivery Order Project Officers (DOPOs), task order Project Officers (TOPOs)) and BPA Call

Ordering Officers.

Section 3.2 Agency's Relationship with Contractors

3.2.1 PURPOSE

Address potential vulnerabilities of the Agency's relationships with contractors and to establish Management Effectiveness Reviews (MERs).

3.2.2 BACKGROUND

Agency audits in 1998 found indications of potential vulnerabilities in the manner in which EPA administers our Agency contracts that can create improper personal services relationships. As a result, the Office of the Inspector General recommended a Agency-level weakness review entitled "Agency's Relationship with Contractors." Since the 1998 review, improvements have been made but attention must continue to be focused on these problems. Therefore, the original review materials are included in section 3.2 as appendices so that they can continue to guide contracting staff.

This section was originally issued as an Acquisition Policy Memorandum (APM) from Romulo L. Diaz, Jr., Assistant Administrator to the General Counsel, the Inspector General, Assistant, Regional, and Associate Administrators on November 23, 1998.

Management effectiveness reviews (MERs) were included as part of the Agency's annual assurance letter for Fiscal Year 1999.

3.2.3 AUTHORITY/APPLICABILITY (*RESERVED*)

3.2.4 DEFINITIONS (*RESERVED*) 3.2.5 POLICY

As part of the corrective action strategy to ensure that EPA's relationship with our contractors remains an appropriate one, the Office of the Inspector General, the Office of Administration and Resources Management, and the members of the Resource Management Committee agreed to take the following steps:

- A) Program and regional offices are to identify all contracts where the contractor is working at a Government facility and evaluate whether this is appropriate and necessary, and if not, relocate the place of performance to an off-site location.
- B) Program and regional offices are to determine which, if any, of their contracts are most susceptible to improper personal services relationships noting that on-site contracts are frequently most vulnerable.

- C) Program and regional offices are then to perform MERs on those with the greatest risk. The Office of Acquisition Management and the regional contracting offices are committed to working closely with our customers and were to provide assistance in performing these reviews.

A review guide (Appendix 3.2A) is used during these reviews. Upon completion of the review, the program or regional office is to provide electronic copies of their report to their contract service center and to Office of Acquisition Management's Acquisition Policy and Training Service Center. Contracting officers are to then review the report findings and discuss any relevant personal services issues with the project officer.

- D) Performance-based contracts are a good tool to help avoid the development of improper personal services relationships because they require less oversight. Program and regional offices are encouraged to evaluate their mission requirements and recommend to their contract service center at least two contracting actions that could be awarded as performancebased contracts. When entire contracts cannot be converted, the Office of Acquisition Management will work with programs to identify whether subsets of a particular contract, e.g., work assignments, delivery orders or task orders could be converted.

The Office of Acquisition Management should assist program and regional offices in setting up their own performance-based contracting training sessions and provide Contracting Officers to participate in some of these sessions. See Appendix 3.2C for a listing of some training opportunities.

With much effort on the parts of both the program, regional and contracting personnel, many positive steps can be to improve the manner in which we administer our contracts.

Attention must continue to focus on these problems to eliminate remaining vulnerabilities. Full support in implementing these actions is necessary to improve and maintain effective contract management.

APPENDIX 3.2A**GUIDE FOR CO-ON SITE VISITS OF ON-SITE CONTRACTS**

The following guide is provided as a non-mandatory tool to be used when appropriate by COs for their on-site visits to on-site contractors.

A) Purpose

The purpose of this review is to objectively evaluate: 1) whether or not any personal services activity is occurring under Agency contracts you manage, and 2) whether or not conditions exist that may create personal service vulnerabilities and what actions should be taken to avoid these vulnerabilities.

B) Scope

For all on-site contracts, we recommend these reviews consist minimally of the following steps: 1) review of contract statement of work, 2) review of applicable work assignment or delivery order statements of work, 3) interviews with contractor and program or regional staff, 4) interviews with contractor and program management personnel, 5) inspection and observation of on-site operation, 6) verification of adherence with Agency procedures (co-location of employees, proper use of badges, use of Agency equipment, etc.), and 7) identification of internal management controls strengths and weaknesses. At the completion of the review a written report should be prepared documenting the results. For additional information, see FAR 37.104 and EPA Order 1901.1A.

C) Criteria

The following are examples of the types of questions and issues that should be explored:

Observation of Physical Space (should be unannounced, if possible)

- Is the contractor's office space clearly marked by a sign indicating the area is occupied by a contractor and includes the contractor's name?
- Is the contractor's on-site space physically separated from Agency space?
- Has the Agency given the contractor staff access to Agency fax machines, copiers, computers or file rooms? If so, has the Agency properly set schedules and priorities for the use of any common equipment by both parties? Is this specified in the contract? Has the Agency given the contractor access to any property and/or equipment not specified in the contract?

- Does the contractor staff routinely wear identification badges which clearly indicate they are contractors?
- Does contractor staff clearly identify themselves as contractors when answering their telephones (or on voice mail greetings)? (Make phone calls either before or after your visit to check this.)
- Are subcontractors physically located on-site? If so, is their space separate from Agency space, etc.? Do Agency personnel work directly with subcontractors?

Observations of Working Relationships (interview Agency and contractor staff separately)

- Do Agency employees instruct or direct contractor staff to perform tasks?
- Has anyone in the Agency recommended, or refused to have, a specific contractor staff assigned to work?
- Do Agency employees instruct the contractor without putting technical direction in writing within given days?
- Has an Agency employee suggested a promotion or bonus for contractor staff, or provided input on the job performance of individual contractor staff? Has any agency employee commended, in writing, any contractor staff specifically?
- Has any Agency employee participated in the hiring or firing of individual contractor staff, including sitting in an interview for potential hires, or suggesting who to hire?
- Has any Agency employee invited contractors to attend Agency meetings not related to the contract work (staff meetings, holiday parties, etc.)?
- Has any agency employee entered a contractor's work area when no contractor supervisor is present? If so, for what reasons?
- Has any Agency employee (project officer, work assignment manager, or any staff) directly requested contractor personnel to conduct work not otherwise required by the contract?
- Has any contractor employee participated as a member of an Agency committee planning an Agency award ceremony?
- Has any Agency employee acted to resolve a personnel complaint from a contractor employee?

- Has any Agency employee assigned tasks to, or prepared work schedules for, contractor employees, including approving when a contractor employee can go on leave?
- Has the Agency retained the right to supervise the work of contractor staff, or reserved the right to control the number of people employed and duties of individual contractor employees?
 - Are contractor staff used interchangeably with Agency staff to perform the same functions?
- Are contractor personnel integrated into the Agency's organizational structure (mixed teams)?
- Are all work assignment managers, delivery order project officers, etc., properly trained? D)

Report

Upon completion of the review, the CO needs to document the results of the review in a written report. The report need not be exhaustive, but should summarize at a minimum the following:

- Introduction - identify which contracts were reviewed; where and when the review was conducted and by whom;
- Sources - provide a description of the sources of the review, i.e., listing of the documents reviewed, individuals interviewed, etc.;
- Findings - listing and brief explanation of any findings; findings include not only problem areas but also positive steps taken to prevent these occurrences;
- Recommendations - a listing of any recommendation for correcting specific findings; and
- Conclusion - a statement as to whether or not the contract has had personal service activity or is vulnerable to this type of activity and what actions have been or will be taken.

A copy of the report should be maintained by the CO and a copy sent to the OAM Policy & Oversight Service Center.

**APPENDIX 3.2B AGENCY'S RELATIONSHIP WITH CONTRACTORS
(PERSONAL SERVICES FACT SHEET)****A) Definition**

A personal services contract is a contract which, by its terms or as administered, results in contractor personnel being subject to relatively continuous supervision and direct control by a Government official or employee. A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. These contracts make the contractor personnel appear, in effect, to be Government employees.

B) Assessing the Nature of a Contract

Federal Acquisition Regulation Part 37,104(d) provides the following descriptive elements to be used as a guide in assessing whether a proposed contract is personal in nature. These elements can also be used as a guide to determine if the way in which a contract is administered creates a personal services contract.

An improper contract relationship may exist if:

- 1) Contractor performance is done on site.
- 2) Contractor's principal tools and equipment are furnished by the Government.
- 3) Contractor's services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of an assigned function or mission.
- 4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- 5) The need for the type of service provided by the contractor can reasonably be expected to last beyond one year.
- 6) The inherent nature of the service or the manner in which it is provided reasonably requires, directly or indirectly, Government direction of supervision of contractor employees in order to:

a) Adequately protect the Government's interest; b)

Retain control of the function involved; or

- c) Retain full personal responsibility for the function in a duly authorized Federal officer or employee.

Note: All of these elements need not be present to have an improper personal service contract. Additionally, having all of these elements present does not necessarily mean that an improper personal services contract exists. The key element is whether the Government exercises continuous supervision and control over the contractor personnel performing the contract. Each situation must be reviewed and a determination made on a case-by-case basis.

EXAMPLES OF PROHIBITED PERSONAL SERVICES

- 1) An Agency employee routinely giving instructions and directions directly to contractor personnel.
- 2) An Agency employee recommending or requesting or refusing to have specific contractor personnel assigned to work on a delivery order or work assignment.
- 3) An Agency employee suggesting a promotion, a bonus, or other performance award for certain contractor personnel.
- 4) An Agency employee sitting in on an interview for potential contractor employees and offering suggestions on whom to hire.
- 5) An Agency employee inviting contractor personnel to attend an Agency staff meeting or other Agency session not related to contract work performance.
- 6) A contractor employee participating as a member of an internal Agency committee.
- 7) A contractor employee complaining of mistreatment from contractor management to an Agency employee who is an Equal Employment Opportunity counselor. An Agency Equal Employment Opportunity counselor pursuing such a complaint.

ADDITIONAL SOURCES

Federal Acquisition Regulation Part 37.104
Contracts Management Manual, Chapter 7, Section 7.3

Environmental Protection Agency Order 190 1.1 A "Use of Contractor Services to Avoid Improper Contractor Relationships", dated April 14, 1994 (<http://intranet.epa.gov/rmpolicy/>)

Office of the Inspector General Audit No. EIBMF 7-23-0012-8100251 "Acquisition Management Review of Personal Services", dated September 29, 1998

**APPENDIX 3.2C AGENCY'S RELATIONSHIPS WITH CONTRACTORS
(PERFORMANCE-BASED CONTRACTING TRAINING OPPORTUNITIES)**

1. Forthcoming training opportunities include:

Location: Washington, D.C.

Sponsor: International Quality Center

More Information: Roz Topolski (312) 977-4311

2. Other vendors providing performance based contracting training include:

Vendor: Naval Center for Acquisition Training

Length of Course: Five day course

More Information: Meg Hogan (757) 443-2352, ext. 130

Vendor: Management Concepts, Inc.

Length of Course: Five day course

More Information: (703) 790-9595

Vendor: Saenz International, Inc.

Length of Course: Four day course

More Information: Bill Heeder (202) 260-2592

Vendor: Stryker Associates

Length of Course: Three day course

More Information: Steven Stryker (301) 924-2152

Vendor: Educational Services Inc., International

Length of Course: Two day course **More**

Information: (888) 374-8884

3. You are encouraged to take advantage of these and other performance-based contracting training opportunities of which you may be aware.

Section 3.3 Safeguarding Bids and Proposals

3.3.1 PURPOSE

This section establishes policy, procedures, and responsibilities for the proper physical control and safeguarding of contract bids and proposals submitted to the Environmental Protection Agency (EPA).

3.3.2 BACKGROUND

EPA routinely solicits from prospective contractors data for which a claim of confidentiality may be asserted. 40 CFR, Part 2, Subpart B, establishes the basic rules relating to the confidentiality of business information.

This section was originally issued as Chapter 11 of the Contracts Management Manual. **3.3.3**

AUTHORITY/APPLICABILITY

The authority for this section is 40 CFR, Part 2, subpart B.

This section applies to all EPA personnel who may gain access to contract bids, proposal, or information pertaining to contract proposals.

3.3.4 DEFINITIONS

- A) Confidential Business Information (CBI) - For the purpose of this section, CBI includes all proposals and bids submitted to any of EPA's contracting activities and data extracted from or pertaining to such proposals and bids.
- 1) Proposals are classified as CBI from the time of receipt at the contracting activity until the contract is awarded.
 - 2) Sealed bids are classified as CBI from the time of receipt at the contracting activity until the time of bid opening.
 - 3) Data contained in proposals for which the submitter has asserted a claim of confidentiality will be classified as privileged information from the time of receipt at the contracting activity and shall be protected under the procedures prescribed in Chapter 11, Part III, of the EPA Security Manual until destruction of the data is authorized.

- B) Minimum secure storage for CBI, not protected under 40 CFR, Part 2, Subpart B, consists of a locked security container which will safeguard the CBI against unauthorized disclosure.

3.3.5 POLICY

3.3.5.1 Responsibilities

- A) The Director, Office of Acquisition Management, is responsible for ensuring that this security system for safeguarding CBI is established; that all EPA contracting activity employees, especially supervisors, realize the importance of strict adherence to these policies; that a training program is developed; and that appropriate action is taken when there are violations of these procedures or compromise of CBI.
- B) The Division Directors are responsible for establishing procedures in accordance with this section which effectively safeguard CBI and for ensuring that their subordinates who require access to CBI are properly instructed in the handling and storage of this material.
- C) Contracting Officers/Contract Specialists are responsible for the security of bids and proposals submitted in response to their solicitations.
- D) Project Officers are responsible for CBI in their custody for technical evaluation and contract monitoring purposes.
- E) All other EPA employees are responsible for safeguarding any CBI coming into their possession and for disseminating such information only to those authorized to receive it.

3.3.5.2 Receipt of Bids/Proposals

Receptionists or other personnel authorized to receive bids and proposals shall date/time stamp the envelope or wrapper of each bid or proposal upon receipt and either hand-deliver it unopened to the Contract Specialist designated in the solicitation package or store it in a secure storage area. The receptionist shall not divulge any information regarding the procurement (e.g., number of bids/proposals received, names of organizations submitting bids or proposals, etc.) to any person. Inquiries regarding the procurement shall be referred to the Contracting Officer.

3.3.5.3 Storage of Unopened Bids/Proposals

The contracting activity shall identify a secure storage area for unopened bids and proposals. Storage equipment shall consist of a file cabinet or other suitable container equipped with a secure locking device.

A specific individual(s) shall be given the responsibility of ensuring that storage equipment is securely locked at the end of the business day and whenever the area is not supervised.

3.3.5.4 Opening of Bids/Proposals

Sealed bids shall be removed from the security area just prior to the time set for bid opening. Bids shall be publicly opened by the appointed bid opening officer and shall be recorded on SF 1409 or SF 1419 for construction in accordance with FAR 14.403.

Proposals shall be opened by the Contracting Officer/Contract Specialist and recorded. The proposals shall be serially numbered with the first proposal opened being assigned number 1. Every copy of the proposal should bear the number assigned to that proposal. The assigned numbers shall correspond with the identification number on the abstract of proposals.

3.3.5.5 Safeguarding Bids/Proposals After Opening

After sealed bids or competing proposals are opened, all practicable measures shall be taken to preclude the possibility of disclosure of information contained in proposals or a substitution, addition, deletion, or alteration in bids.

A) Sealed bids. The original copy of sealed bids shall be kept under the immediate supervision or control of an authorized person in the contracting activity at all times during the acquisition process and placed in secure storage when not in use. After the contract has been awarded, the original of the successful bid shall be included in the official contract file.

B) Competing proposals.

- 1) The Contracting Officer/Contract Specialist will separate the technical and business proposals and make appropriate distribution for evaluation. The Contracting Officer/Contract Specialist will ensure that technical and cost proposals retained by them are stored in a secure storage area. If technical evaluation will be performed by a panel, sufficient copies of each technical proposal will be furnished to the panel chairperson so that each panel member will receive a complete set.

- 2) Proposals shall be transported between offices in a sealed double-wrapper, either by U.S. mail, hand-delivery, or bona fide commercial messenger service. The inner

wrapper shall be marked "Confidential Business Information - to be opened by addressee only" or similar annotation. The intended recipient shall be clearly identified on the outer wrapper. The addressee will be the panel chairperson who will be responsible for the security of the proposals until they are returned to the Contracts Office. Proposals shall not be transported through the interoffice mail system, except sealed, double-wrapped proposals may be transported to and from local mail rooms in conjunction with handling by the U.S. Postal Service.

- 3) Upon distributing the proposals, the Contract Specialist shall ensure the panel members are made aware of the confidentiality or sensitivity of the material contained in the proposals and the prohibition of any communication regarding the review process with anyone other than other panel members. Any questions on procedures or any clarifications needed by the panel shall be referred to the Contracting Officer/Contract Specialist.
- 4) When the work of the technical evaluation panel has been completed, all copies of the proposals, evaluation reports, and any other documents related to the evaluation must be returned by the chairperson to the contracting office. These documents shall not be routed through any other offices or persons. The instructions in section 3.3.5.5 B(2) shall be followed in transporting the proposals between offices. Panel members are not authorized to retain any proposal or to make copies of any of the material submitted by offerors. The Contracting Officer will return to the technical evaluation panel any materials needed for debriefing purposes and will collect all materials at the conclusion of the debriefing sessions.
- 5) Upon receipt of the proposals and other review documents, the Contracting Officer/Contract Specialist shall return these documents to the security area until such time as they are needed for further action.
- 6) Cost proposals shall be transported for cost analysis to the cost advisory group and to the Project Officer by secure means as indicated in section 24.1.5.5 B(2). Cost proposals retained by the cost advisory group shall be stored in accordance with section 3.3.5.3.
- 7) After contract award, the original of the successful proposal shall be included in the official contract file and one copy will be furnished to the Project Officer for monitoring the contract.

- 8) All other written documents which contain references to material contained in proposals shall be safeguarded in accordance with procedures in this section. This includes pre-negotiation memoranda, recommendations of cost analysts and Project Officers, and any summaries of proposal information. Division Directors shall ensure that word processing disks or other electronic media that contain confidential proposal information are safeguarded in accordance with procedures in this section.

C) Sole Source proposals. Sole source proposals shall be handled with the same level of security as required by this section for competitive proposals.

3.3.5.6 Disposition of Unsuccessful Proposals

The original of each unsuccessful bid/proposal shall be retained in the Contracts Office for a minimum of 90 days after award. After 90 days, the original of all unsuccessful bids/proposals may be sent to the Federal Records Center except where claims, litigation or similar matters are in process. All other copies of proposals, including unneeded copies of the successful proposal, shall be destroyed by burning, shredding, pulverization, or any other method approved by the chief of the relevant contracting office.

3.3.5.7 Discussions with Offerors/Contractors

Negotiation sessions will be conducted in an area that allows for confidential discussions. The Division Directors shall approve conference rooms or other areas which will provide for secure discussions of confidential proposal information.

3.3.5.8 Other Security Measures

Each Contracting Office shall identify a visitors' conference room or area located away from the contract operations area. Visitors, including contractors and potential contractors, shall be required to register with a receptionist and wait in the visitors' area to be announced to the appropriate contracting office personnel. Contracting office personnel shall meet visitors in the visitor area or when necessary, personally escort visitors to the contracts operations area. Contracting office personnel who permit visitor access to the contracting office operations area are responsible for ensuring that confidential and sensitive documents are protected from viewing by visitors while in the area.

Precautions shall be taken to ensure that access of on-site contractors to the contracts operations area is controlled. Agency personnel must take particular caution to ensure that on-site contractors do not have access to confidential, proprietary, or business sensitive information unless their contracts include clauses that authorize such access and provide for safeguards to protect the information.

Requests from the public for access to documents pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. Section 552) shall be handled in accordance with the Agency's regulations at 40 CFR, Part 2 and EPA 1550 Freedom of Information Manual dated 5/4/92.

3.3.5.9 Review of Procedures

An assessment of each contracting activity's compliance with the procedures in this section will be a part of the Office of Acquisition Management quality assurance review program.